UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 554

Case No. 579: FAGAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas at the request of Susan R. Fagan, a staff member of the United Nations, specially recruited for the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 October 1990 and 31 January 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 January 1991, the Applicant filed an application containing the following pleas:

"Section II: Pleas

The Administrative Tribunal is respectfully requested to rule that:

1. Selection for the post of Records Management Officer, VN-89-054 was flawed because subjective and extraneous considerations were at the root of the selection process;

2. UNICEF correct the inequity that resulted from the flawed selection by offering an equivalent appointment."

Whereas the Respondent filed his answer on 28 February 1991;

Whereas, on 18 May 1992, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 12 May 1966, as a File Clerk/Typist at the G-2 level. After serving on a succession of fixed-term appointments and, with effect from 12 November 1966, on a probationary appointment, she was granted a permanent appointment on 1 May 1968. During the course of her employment with UNICEF, the Applicant was promoted to the G-3 level on 1 February 1967, to the G-4 level on 1 July 1974 and to the G-5 level on 1 January 1980, with the functional title of Registry Assistant. On 10 July 1987, the Applicant became Basic Assistant List Control Clerk at Headquarters. On 13 January 1992, she was assigned to the Office of the Director of the Programme Division.

In March 1989, the Division of Personnel issued a Vacancy Announcement to advertise the P-3 level post of Records Management Officer in the Division of Information Resources Management. The announcement was in accordance with the guidelines contained in UNICEF administrative instruction CF/AI/352/Amend.4 governing the appointment of staff to posts which had been upgraded and were encumbered by staff. Four staff members applied for the position, including the Applicant and the incumbent of the post.

According to the record of the case, a Selection Advisory Panel met on 7 July 1989, with a representative from the Information Resources Management Office, the Division of Personnel and the UNICEF Appointment and Promotion Committee (APC). After reviewing the qualifications of all candidates, the Panel included the Applicant and the incumbent of the post on a short list and recommended to the APC that the incumbent of the post be selected on the basis of his qualifications and experience. On 13 July 1989, the APC endorsed the recommendation by the Selection Advisory Panel to appoint the incumbent of the post to the position.

In a letter dated 20 July 1989, a Senior Recruitment and Staff Development Officer informed the Applicant that she had not been selected for the post. On 14 September 1989, the Applicant requested review of the administrative decision not to appoint her to the post of Records Management Officer. In a letter dated 16 October 1989, the Deputy Executive Director, on behalf of the Executive Director, informed the Applicant that the Executive Director had decided to maintain the contested decision.

On 14 November 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 22 March 1990. Its considerations, conclusions and recommendation read as follows:

"Considerations

...

22. It noted, as has also been pointed out by the Respondent, that, in her request for administrative review, the appellant alleged that the selection decision was made contrary to UNICEF's current appointment, placement and rotation policies. However, in her letter of appeal, she mentions only that this decision 'infringed upon my right for proper consideration for a vacant position for which I hold the required qualifications and experience' and requests that the JAB compare the qualifications, skills and experience of the two shortlisted applicants in relation to the job requirements. In this connection, the Panel recalled that the United Nations Administrative Tribunal has consistently held that it cannot substitute its view for that of the Secretary-General concerning the evaluation of the performance of a staff member, since this matter lies within the Secretary-General's discretionary authority. Therefore, it was limited to examining whether the appellant was afforded due process and whether the selection was tainted by prejudice or motivated by extraneous factors.

23. The Panel noted that the appellant alleges that the 'selection decision' infringed upon her right to be fairly considered for the post and requests that UNICEF be committed to 'correct the unfairness created which is compounded by an element of discrimination.' It reviewed the procedures followed by UNICEF in making its selection for the post in question and could find no indication of unfairness or discrimination.

24. The Panel also noted that the appellant does not specify in what way the selection process was unfair or discriminatory, other than stating that the UN system often discriminates against women in general by bypassing them for appointment and promotion in favour of men. In this connection, the appellant is apparently under the impression that it is incumbent upon the respondent 'to bring forth concrete evidence to show fairness and equity and lack of discrimination.' Since the Tribunal has consistently held that 'the burden of proving prejudice or improper motivation rests with the Applicant', (Judgement No. 93, Cooperman), the Panel could not entertain the appellant's request.

Conclusions and recommendation

25. The Panel concludes that the appellant has not sustained the burden of proving discrimination, unfairness or improper motivation in connection with the decision not to select her for the post of Records Management Officer. Moreover, the Panel could find no such evidence after its own examination of the matter.

26. Accordingly, the Panel makes no recommendation in support of the appeal."

On 30 March 1990, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined the case in the light of the JAB report, had decided to maintain the contested decision and to take no further action on the case.

On 31 January 1991, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. In not selecting the Applicant for the post in question, the Respondent based himself on an unsubstantiated, subjective and flawed evaluation.

2. The Applicant is more qualified to discharge the functions of the post than the person selected therefor.

3. The decision not to select the Applicant for the post contravenes recent decisions of the General Assembly which mandate that, in filling posts, preference should be given to a female candidate, if she has, at least comparable qualifications with a male candidate.

Whereas the Respondent's principal contention is:

Staff have a right to consideration for promotion in accordance with the Staff Regulations and Rules and Instructions promulgated thereunder. The Applicant was accorded such consideration for promotion and thus the selection of another staff member for promotion did not violate her rights.

The Tribunal, having deliberated from 2 to 25 June 1992, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rule first that the "selection for the post of Records Management Officer, VN[Vacancy Notice]-89-054 was flawed because subjective and extraneous considerations were at the root of the selection process" and second, that UNICEF "correct the inequity that resulted from the flawed selection by offering an equivalent appointment."

II. In the explanatory statement of the application, the Applicant asserts that while "proper selection procedures were supposedly followed, ... the substantive evaluation was flawed" because the selection decision rested upon the written recommendation of the Director of the Division of Information Resources Management, whose assessment read: "Although [the Applicant] has some of the qualifications required, I do not feel that she presently has the in-depth experience of the records management area or the supervisory skills or the technical expertise required by the post". In the Applicant's opinion, "this assessment [was] entirely unsubstantiated and ... based purely upon subjective factors." She also asserts that, "more importantly, no comparative factual analysis was made of the relative qualifications and work experience of the two leading candidates in relation to the job requirements." (Emphasis in the original text).

III. In addition, the Applicant is of the opinion that when her case was considered by the Joint Appeals Board (JAB), it "felt that it could only look into whether proper selection procedures were followed but not whether the substance of the matter was appropriately determined."

IV. In the same context, the Applicant makes a wide-ranging allegation that the selection decision goes against recent decisions of the General Assembly to the effect that, in filling vacant posts, preference should be given to a female candidate if she has at least comparable qualifications with a male candidate. In the Applicant's view, this requirement was not met, despite the contention by UNICEF that the Administration was actively pursuing a policy of affirmative action in favour of women, especially women from developing countries. At the same time, the Applicant emphasizes that it is also a policy of UNICEF, that general service staff members who have taken the initiative to upgrade their skills should be given favourable consideration for posts in the professional category.

V. Finally, the Applicant alleges that she may have been victimized because of her involvement in staff activities: the Applicant was Chairperson of the UNICEF Global Staff Association, officer of the UN Staff Union and representative of the UN Staff Council to the Annual General Meetings of the Coordinating Committee for Independent Staff Unions and Associations.

VI The Applicant maintains that the decision not to select her for the post of Records Management Officer was contrary to the current appointment and placement policy of UNICEF, especially as stated in paragraph 2 of CF/AI/352/Amend.4, dated 15 July 1988, which provides, inter alia, "...in no case can the reclassification procedure be ... viewed as an alternative method for promotion...", and was also contrary to the UNICEF policy of rotating internationally-recruited staff members. In addition, the Applicant expected that her service with UNICEF for 23 years would adequately be taken into account.

VII. The Tribunal observes that in her request for review of the decision not to appoint her to the post, the Applicant argues that the decision infringed upon her right for proper consideration for a vacant position for which she possessed "outstanding qualifications in records management" as well as "extensive work experience". She states that she satisfied the job requirements "far more than the other candidates for the post". The Applicant subsequently requested that the JAB compare her qualifications, skills and experience with those of the other applicant who applied for the job and who was short-listed with her by a panel constituted to advise on the selection for the post.

VIII. After considering the issues raised by the Applicant in her request for administrative review, in her letter of appeal to the JAB and in her application in the present case, the Tribunal draws attention to its jurisprudence that, as far as promotions are concerned, the general rule is that they are subject to the discretion of the Secretary-General and that, "consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy". (Cf. Judgement No. 312, Roberts (1983), para. II). Accordingly, in the present case, the Tribunal

would not substitute its view for that of the Secretary-General concerning the evaluation of the Applicant's performance, since the selection of a staff member for a particular post or for promotion rests within the discretionary authority of the Secretary-General.

IX. The Tribunal must therefore establish whether the existence of prejudice or improper motive, breach of procedure or any other extraneous factor has vitiated the decision contested by the Applicant.

X. The Tribunal notes that the Applicant does not question that selection of the candidate for the post of Records Management Officer by the Selection Advisory Panel and the Appointments and Promotion Committee was in accordance with the review procedures set forth in the UNICEF Personnel Administration Manual. She suggests however, that these procedures were merely a formality and goes on to challenge the substance of the selection process. In this regard, the Tribunal notes that, according to its jurisprudence, candidates are entitled to full and fair consideration for appointment. From the evidence on record, the Tribunal concludes that the Applicant's rights were respected. It could find no indication of unfairness or discrimination against her.

XI. In considering the Applicant's allegations that the selection for the post was flawed because subjective and extraneous considerations were at the root of the selection process, the Tribunal was aware that all choices are inevitably subjective to some extent. However, the question is whether, in the present case, the decision to select another candidate was tainted by prejudice or motivated by extraneous factors. In this respect, the Tribunal has consistently held that "the burden of proving prejudice or improper motivation rests with the Applicant...". (Cf. Judgement No. 93, Cooperman (1965), para. XII). Accordingly, an applicant alleging that a discretionary administrative decision is tainted by prejudice or improper motivation must adduce convincing evidence. The Tribunal concurs with the JAB's conclusion that the Applicant has not discharged the burden of proving discrimination, unfairness or improper motivation in connection with the decision not to select her for the post of Records Management Officer.

XII. On the Applicant's allegation that the decision was contrary to UNICEF policy of rotating internationally recruited staff members, the Tribunal notes that the relevant section of CF/AI/352/Amend.4 of UNICEF, provides in paragraph 5, that:

> "In reviewing the incumbent of the old post along with other applicants, the APC [Appointment and Promotion Committee] will take into account the Organization's policy to rotate internationally-recruited staff members recruited under the 100 Series of UN Staff Rules, who have completed their full tour of duty required at a given duty station. Therefore, in case the incumbent of the old post has completed his/her full tour of duty and has applied for the new/upgraded post, the APC may recommend him/her for the new/upgraded post if it is satisfied that he/she is by far the best qualified applicant and the interest of the Organization would be best served by his/her appointment. Should the incumbent be appointed to the new/upgraded post, he/she would be expected to remain at the duty station for at least half the period of the normal tour of duty."

In the light of the above, the Tribunal could not find that the decision taken by UNICEF and contested by the Applicant was contrary to UNICEF policy on the matter.

XIII. According to the Applicant, "the selection decision goes against recent decisions of the General Assembly to the effect that in filling vacant posts, preference should be given to a female candidate if she has at least comparable qualifications with a male candidate."

In this regard, the Tribunal notes that the General Assembly has adopted a number of resolutions directed to the improvement of the status of women in the United Nations Secretariat. In accordance with these resolutions, the Secretary-General approved the First Report of the Steering Committee for the Improvement of the Status of Women in the Secretariat, and took specific measures to implement the recommendations included in the report (ST/SGB/220(Annex). In addition, in guidelines issued by the Office of Human Resources Management for the appointment and promotion bodies, directed to "the improvement of the status of women", it is provided, inter alia, that "...attention should be paid to exceptional merit, ability to perform at a

higher level..." (paragraph 4(a) of annex II of administrative instruction ST/AI/338/Add.5).

The Tribunal finds no evidence in the present case of a violation of these guidelines.

XIV. With regard to the Applicant's allegations that she may have been victimized because of her involvement in staff activities, the Tribunal notes that the Applicant has not produced adequate evidence in support of her contentions.

XV. The Tribunal concludes, in the light of the above, that there is no evidence of prejudice or extraneous factors vitiating the decision not to select the Applicant for the post of Records Management Officer.

XVI. In view of the foregoing, the application is rejected in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Samar SEN
Member

Ioan VOICU
Member

Geneva, 25 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary